No. 15033

IN THE

United States Court of Appeals

For the Ninth Circuit

1956 TERM

GILBERT RIPKA and WILSON BROTHERS TRUCK LINES, INC. a corporation,

Appellants,

vs.

CHARLES CREHORE, General Administrator of the Estate of Herbert Noah Sanders and Delphia F. Sanders,

Appellee,

Appeal from the United States District Court for the District of Arizona

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APPELLANTS' REPLY BRIEF

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INDEX

CITATIONS

CASES

ARIZONA REVISED STATUTES

TREATISES

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I—REPLY TO ARGUMENT RE JURISDICTION

Appellee states "where the allegations (re jurisdiction) are not challenged and there is nothing *on the face of the record* to cause doubt of jurisdiction, the court will not inquire sua sponte." (Appellee's Brief, p. 10) (Emphasis supplied)

As we indicated in Appellant's Opening Brief, but for the formal and startling admission of record by appellee's counsel

(in the presence of Arizona counsel for appellee) to the effect that counsel did not even know who his client was (T.R. 72) the question as to jurisdiction would never have occurred to appellants and we would have assumed jurisdiction in fact existed and had been proved of record.

Appellee relies upon the Petition for Removal containing the statement to the effect that the plaintiff Wanek was a citizen of Arizona as sustaining jurisdiction. We would freely admit that were this cause one pending in a court of general jurisdiction the matter would not be open to question. Clearly we would be estopped to suggest the matter to the court. Such is not the case.

This court has so consistently enunciated the rule with respect to the showing required to sustain jurisdiction that no more than a reference to the leading cases should be required:

> "An appellate federal court must, of its own motion *and even against the consent or protest of the parties,* satisfy itself not only of its own jurisdiction but also of that of the lower court in a cause under review." (Emphasis supplied)

Royalty Service Corporation vs. City of Los Angeles, 98 F. 2d 551

See also:

Electro Therapy Products Corp. vs. Strong, 84 F. 2d 766

Alexander vs. Westgate etc. Co., 111 F. 2d 769

Jones vs. Brush, 143 F. 2d 733

Van Buskirk vs. Wilkinson, 216 F. 2d 737

We, therefore, upon reading the transcript of the trial in the District Court, being forcibly impressed by the statement of counsel for appellee above referred to, became curious as to just what the record showed as to his identity. This curiosity was

whetted by recollection of the fact that this shadowy client did not put in any appearance at the trial. We concede plaintiff, Wanek's, original counsel told counsel for Ripka that Wanek resided in Flagstaff when the suit was instituted. If that be sufficient to support federal jurisdiction we are content.

The statement in footnote 8, page 9, that Wanek was an attorney is without support in the record. Apparently the short answer to this portion of the legal problem here presented, if it be a problem, is that the matter was never considered in the trial court for the simple reason it did not come to our mind until a reading of the transcript raised a question as to what the record in fact was.

We concede that if the failure of the learned trial judge to question jurisdiction when counsel disclaimed, in effect, any known client, and no client appeared, was proper and, if, on this record this court is satisfied jurisdiction in fact existed, there is no legal problem posed.

II—POWER OF SPECIAL ADMINISTRATOR TO INSTITUTE ACTION

We concede that a number of state courts have held that a special administrator may maintain an action for wrongful death. We respectfully submit that under the Arizona statute this result cannot be reached. We further submit that logical, legal reasoning forbids such a result.

We further assert that even if it be concluded that a special administrator may bring such an action such a special administrator must be a *lawfully* appointed special administrator—an administrator in fact pursuant to a lawful order of appointment by a court acting within its jurisdiction.

It is held almost without exception that a probate court is not a court of general jurisdiction in the true sense of the word

—it is a court with statutory powers as distinguished from a court of general jurisdiction employing general and inherent powers.

Bancrofts Probate Practice, 2nd Edition, Vol. 1, page 50 thus states the rule:

> "Since probate proceedings are everywhere recognized as being statutory in their nature, the effect of a specific enumeration of powers of a court exercising probate jurisdiction is to limit such powers by implication to those expressly conferred."

In *Vargas vs. Greer,* 60 Ariz. 110, 131 P. 2d 818, the Supreme Court of Arizona recognized this rule. It quoted with approval from a California and a Montana case as follows:

> ". . . It is said in Texas Co. v. Bank of America, etc., Ass'n, 5 Cal. 2d 35, 53 P. 2d 127, reading page 130: ' "Probate proceedings being purely statutory, and therefore special in their nature, the superior court, although a court of general jurisdiction, is circumscribed in this class of proceedings by the provisions of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided. Smith v. Westerfield, 88 Cal. 374, 379, 26 P. 206." '
>
> "Again at page 131 of 53 P. 2d (quoting from State ex rel. Shields v. Second Judicial District Court, 24 Mont. 1, 60 P. 489, 493): ' "* * * Its power when sitting in probate matters is derived from the statute, and it cannot go beyond the provisions of the statute * * * " ' "

We feel appellee has entirely missed the main point upon which we relied in our opening brief. We may concede for the purpose of this argument that a properly appointed special administrator may maintain an action for wrongful death; yet appellee must fail for the record fails to support a finding that Wanek was so properly appointed.

We believe we demonstrated in our opening brief that it is the law, as enunciated both by the Supreme Court of Arizona

and by the Supreme Court of the United States (pp. 24, 25, Appellants' Opening Brief) that where there are two statutes dealing with the same subject matter, one a general statute, the other one dealing with the same subject matter in a minute and definite manner, the two are to be read together and both given effect, if possible.

Here we have a general statute, Section 12-612 A.R.S., which in general terms authorizes a "personal representative" to bring an action for wrongful death. Immediately the question arises as to what the legislature meant in so enacting this section. The legislature defined the term as a part of the statute:

> "The term 'personal representative' as used in this section shall be construed to include any person to whom letters testamentary or of administration have been granted by *competent* authority under the laws of this or any other state. * * * " (Emphasis supplied)

Manifestly, if the letters of administration which are tendered to support the capacity of the action are issued by the courts of Arizona the legislature intended that they be letters issued in conformity with the applicable law as declared in the appropriate statute.

Section 14-442 (Appendix, Opening Brief, pp. 33, 34) grants to the Arizona Probate Court the power to appoint a special administrator and specifies how this shall be done and what powers such special administrator shall enjoy.

> "The appointment of a special administrator may be made at any time, and without notice, and shall be made by entry upon the minutes of the Court, *specifying the powers to be exercised by the special administrator.* Upon the order being entered, the clerk shall issue letters of administration to such person *in conformity with the order.*" (Emphasis supplied)

There are sound reasons why the probate court should pass upon the necessity for the special administrator to institute a

wrongful death action, fix the bond giving consideration to any probable recovery, and to otherwise supervise the powers of its ex parte appointee. We can only conclude from the letters offered that the court did no more than appoint Wanek a special administrator without specification of any further authority whatsoever. We recognize that it may be argued that it is not necessary the letters specify the powers granted but such an argument rests upon wishful thinking rather than logic. The purpose of the letters is to certify to the authority of the representative of the court and, therefore, if such is the purpose to be served, the letters issued must measure the authority granted.

The present provisions of the Arizona code regarding special administrators and their powers has remained practically unchanged since 1901. However, it was not until the 1913 revision (Title XXIII, Sections 3372, 3373, 1913 Revised Statutes) that there was added to our wrongful death statute the present definition of "personal representative". In other words, in 1913 the Arizona Legislature defined this term as including any such appointee—i.e., general or special administrator, appointed by competent authority pursuant to the laws of this state.

Certainly the legislature intended thereby to authorize such action by a special administrator appointed in conformity with the law then on the books specifying how this should be done.

The situation is no different, if we follow appellee's argument to its logical conclusion than if the legislature in the section of the probate code, had specifically stated that the special administrator might be empowered, in addition to the other powers which the court might grant him, to bring an action for the wrongful death of the decedent, and then follow this phrase of authorization to the probate court with the limitation that the order of appointment should specify what authority the court desired the special administrator to have. Merely because the authorization to the special administrator to bring such an action (if it be conceded that such authorization is granted) is found in another part of

the code it does not follow that it is freed from the wholesome restraint that the appointing court in its discretion, shall determine what authority should in fact be conferred upon the special administrator.

None of the cases cited are in point. *Henkel vs. Hood,* 49 N.M. 45, 156 P. 2d 790 involves the right of a plaintiff *properly appointed* pursuant to the laws of Texas as Community Administrator to maintain a wrongful death action in New Mexico. There was involved no requirement that the order of appointment should specify what powers the administrator should have or that the letters issued should certify these powers.

Dominguez vs. Galindo, 122 C.A. 2d 76, 264 P. 2d 213 likewise did not involve a statute which required that the power of the court to appoint a special administrator should be exercised by the probate court through an order specifying the powers to be enjoyed, which powers should be spelled out in the special letters.

The same is true of *Jones vs. Minnesota Transfer Ry. Co.,* 108 Minn. 29, 121 N.W. 606 and *Swan vs. Norvell,* 107 Wis. 625, 83 N.W. 934. So also, the same fatal distinction destroys the effectiveness as a valid precedent of the cases *Keys vs. Pennsylvania Ry. Co.,* 158 Ohio St. 362, 109 N.E. 2d 503; *Nickles vs. Wood,* 221 Ark. 630, 225 S.W. 2d 433; *Brooks vs. Sessoms,* 53 Ga. 453, 186 S.E. 456 and *Wilson vs. Pollard,* 190 Ga. 74, 8 S.E. 2d 380. In fact, *Nickles vs. Wood* involves the right of a court to appoint a special administrator as a *defendant* and the validity of service upon such appointee.

The case of *Stanolind Oil and Gas Co. vs. Jamison,* 204 Okla. 93, 227 P. 2d 404, relied upon by appellee actually is authority for appellants' position. There the action was brought by a special administrator for wrongful death. The order of appointment did not recite any power to be exercised by the special administrator and there was no minute entry of the order. Subsequent to ver-

dict and judgment plaintiff was permitted to file an order nunc pro tunc by the probate court reciting that by inadvertence the order had not granted the authority to bring the action and specifically granting the authority to bring the action to the special administrator.

The Oklahoma Supreme Court, two Justices dissenting, held that since the mother of the deceased, the real party in interest, was in being and could have brought the action in her own name, she should be permitted to substitute the *then properly authorized* special administrator for herself. The court said:

> "In the instant case the mother was the real party in interest, she being the next of kin of the deceased. 12 O.S. 1941 § 1053. She could have maintained the action in her own name. 12 O.S. 1941 § 1054. Therefore the requirement pointed out in Dierks v. Walsh, supra, that there must be a person in being who could maintain the action in his or her own name is complied with, and the mother could have been substituted as party plaintiff under the rule announced in that case. Instead of having herself substituted she perfected the appointment of the administrator so that he was then qualified to act as her representative. This was equivalent to the substitution of herself, and such substitution was permissible under the decisions cited above."

In his dissenting opinion, joined in by Justice Welch, Justice Gibson said:

> "The method prescribed for the appointment of special administrators and for clothing them with the powers to be exercised is prescribed in 58 O.S. 1941 § 212, as follows: 'The appointment may be made without notice, and must be made by entry upon the minutes of the court specifying the powers to be exercised by the administrator. Upon such order being entered, and after the person appointed has given bond, the judge must issue letters of administration to such person, in conformity with the order in the minutes.'
>
> "In making the appointment of the special administrator there was no specification upon the minutes, or elsewhere, of his

powers as such. Since by the terms of the statute the specification of the powers to be exercised *is made mandatory and thus a condition precedent to the grant of letters carrying such powers,* the plaintiff herein did not become clothed with authority to institute the action. In view of the clear import of the statute, *that the definition of the powers must precede the grant of letters, the county court is necessarily without jurisdiction to later supply such power through retroactive order or thereby render authoritative acts theretofore done by the administrator without authority by reason of the absence of power.* An authority clearly in point and holding in accord with these views is P. J. Willis & Bro. v. Pinkard, 21 Tex. Civ. App. 423, 52 S.W. 626." (Emphasis supplied)

Even accepting the test of the majority, appellee here fails to meet the test *since there was no person in being capable of maintaining the action.* The children could not do so.

The statement finally made that appellants were not prejudiced will not bear careful scrutiny or analysis. What would have been the result had the jury found in favor of appellants? Could not a general administrator have re-filed the action, disclaimed any responsibility for the actions of the special administrator and pointed to the absence of any grant of authority in the order appointing the special administrator? As a matter of logic and justice, should not a party be entitled to an adversary rightfully in court and therefore capable of binding the adversary side, whatever the outcome?

III — LIABILITY

We, of course, did not present our argument on liability in the expectation that the court was to re-try this issue. We merely desired to emphasize that the unreasonable amount allowed by the jury must, clearly, have infected their examination of the issue of liability.

Appellee bases his claim that the finding of liability was reasonable upon the grounds:

(a) The accident occurred on a curve — (of as much probative value as the fact our driver was over six feet tall — if such be the fact);

(b) One party was on the curve travelling to the left; the other in the other lane. West of the accident scene the highway is straight and level; east it enters rolling country which is winding and hilly;

(c) A straight line drawn down appellants' lane of travel would cross the highway to appellee's side and to the resting place of the truck — (The truck suffered an impact to its left front wheel of sufficient severity to tear it loose from its moorings which of necessity would turn the truck across the highway. The air brakes on the trailer were actuated through the impact thereby causing the trailer brakes to take hold as the truck continued along its deflected course of travel);

(d) The debris, etc. were on the Hudson's side of the highway. (It would be most remarkable if this were not so. As we demonstrated in our opening brief, the blow to the left front wheel of the tractor turned it and spun the Hudson around. Considering the respective weights of the vehicles the laws of physics require that this happen);

(e) The evidence of physical damage to the vehicles. (Appellee avoids answering the only conclusion which can logically be drawn from the physical facts. You just cannot explain the undamaged iron plate across the front of appellants' radiator, the sharply bent-in left front bumper and the raked-away left side of the tractor upon any basis other than that appellee's decedents cut across and into the left front of the tractor. You cannot conclude from the physical evidence other than that had the heavily loaded tractor and trailer been in fact turned into and pointed against the Hudson it would have rolled over the Hudson like a steam roller over a beer can);

(f) The conclusion of the investigating officer, by his own admission, is of no validity due to his uncertainty as to its soundness.

We submit a dispassionate study of the physical evidence warrants no conclusion other than that the Hudson crossed over the center line and that appellants are being mulcted in over $80,000 in damages they do not owe, actually or morally.

IV — VERDICTS

Appellee quickly passes by the proposition that under Arizona law the matter of assessing damages for wrongful death is a quite different matter than awarding such damages for personal injury. Peculiarly within the judgment of a jury is and should be valuing human suffering, discomfort and the like concomitants of a personal injury.

But a wrongful death action, apart from liability, boils down to determining and calculating as a matter of mathematics from the evidence what the deceased would have earned and saved and then reducing this amount to its present value.

We did not, nor do we now, represent that this Circuit is committed to or should be committed to the "reasonable man" theory. As we read the cases, prima facie, the trial court's ruling on a Motion for a New Trial for excessiveness of the verdicts is correct. However, if under the evidence the award is grossly excessive, shocking, plainly not bottomed upon the evidence, the appellate court should not let it stand. This, we submit, is the record here.

As disclosed by Appellee's Brief, there are ten cases in Arizona wherein our Supreme Court has had before it the question of excessiveness of an award for wrongful death. The highest award of these ten cases was the *Inspirational Consolidated Copper Company - Bryant case,* an employer-employee relationship situation

before Workmen's Compensation, in the amount of $18,750. The other awards above $12,500 were all employer-employee situations before Workmen's Compensation. The highest award for wrongful death, apart from employer-employee suits was the sum of $12,500 in *Western Truck Lines vs. Berry,* 78 P. 2d 997. Of these ten cases the award has been $5,000 or less in five cases, $10,000 in one case, and the $12,500 award above referred to.

Here we have what is, in effect an award based upon the earning power of the husband of $83,750; a finding that in his remaining years he would earn enough to support himself, his wife and minor children, pay his taxes, etc., and yet save enough to pass an amount substantially over $100,000 on to their respective estates upon the death of husband and wife.

Either instructions as to the law mean something or they don't. We can piously protest our adherence, not to the forms of justice, but to the substance of justice, but if we give but lip service to such protestations our protestations mean nothing. There is no possible basis in the evidence upon which these verdicts can be justified.

If this does not make them monstrous and grossly defective we do not know what would achieve that result. Certainly a verdict whereby defendants are called upon to "cough up" $83,750 which is without support or justification in the evidence is not a pretty thing.

Respectfully submitted,

SNELL & WILMER

By Mark Wilmer